Filed 5/21/07 Guardianship of Jeffrey J. CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

Guardianship of the Persons and Estates of JEFFREY J. et al., Minors.	
O. P., Petitioner and Respondent, v. BYRON B., Objector and Appellant.	B185836 (Los Angeles County Super. Ct. No. BP087287)

APPEAL from a judgment of the Superior Court of Los Angeles County. James E. Satt, Judge. Affirmed.

Byron B., in pro. per., for Objector and Appellant.

Harris • Ginsberg and Suzanne Harris; Trope and Trope and Thomas Paine Dunlap for Petitioner and Respondent.

Byron B. is the father of J. B. and Justus B. He appeals the trial court's order granting O. P. guardianship of her grandchildren, Jeffrey J., J. B., and Justus B. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Byron B. and Y. P. were married in 1996. Y. P. had a minor son from a previous relationship, Jeffrey J., Jr., born in 1991. Byron B. and Y. P. had two children, Justus B. and J. B., born in 1994 and 1998, respectively. Byron B. and Y. P. divorced in 2002. The parents shared legal and physical custody of J. B. and Justus B., with Y. P. bearing primary responsibility for the care, custody and control of the children.

Y. P. was killed on September 14, 2003. Y. P.'s mother, O. P., moved into Y. P.'s home and began caring for the children. On October 28, 2003, O. P. filed a petition for guardianship of the three children. The trial court granted O. P. temporary guardianship of the children, and later, on June 30, 2005, the court appointed her the guardian of Jeffrey J., Justus B., and J. B., with full legal and physical custody. Byron B. was granted visitation. Byron B. appeals.[1]

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[1] It is not clear whether Byron B. intends to appeal the order of guardianship with respect to Jeffrey J. The notice of appeal mentions all three children, and in many instances in his briefing Byron B. argues that the guardianship order should be overturned without making any distinction between Jeffrey J. and the other children, but the primary focus of Byron B.'s briefing is the order as it impacts Justus B. and J. B. Because Jeffrey J.'s father consented to O. P. as Jeffrey's guardian, the legal analysis addressed by Byron B. concerning nonparent guardianships ordered over the objection of a parent does not apply here, and Byron B. makes no separate arguments concerning the guardianship of Jeffrey J. or what standing he would have to appeal that guardianship. Accordingly, we understand the appeal as challenging the guardianship order made as to Justus B. and J. B., and mention Jeffrey J. only as facts about him are relevant to our analysis.

DISCUSSION

In an emotional, wide-ranging, and loosely structured 86-page brief, Byron B. expresses dissatisfaction with all court proceedings since the guardianship petition was filed,[2] but focuses on and appears to be primarily aggrieved by the only issue he specified in his notice of appeal: the order appointing O. P. the children's guardian.[3] Byron B. complains that the trial court lacked sufficient evidence of detriment to order a guardianship; misunderstood the applicable legal standard for granting a guardianship; failed to consider vital facts and evidence; and ultimately violated his constitutional rights to raise his children and sanctioned kidnapping through the issuance of letters of guardianship.

Probate Code[4] section 1510, subdivision (a) provides that a relative, among other people, may petition the court for guardianship of a minor. After a hearing, the trial court may appoint a guardian of the minor's person, estate, or both, "if it appears necessary or convenient." (§ 1514, subd. (a).) In making the appointment of a guardian, a number of provisions of the Family Code apply. Among them is the order of custodial preference set out in Family Code section 3040. Family Code section 3040, subdivision (a) states that custody should be granted according to the best interest of the child in the following order of preference: to both parents jointly or to either parent; "[i]f to neither parent, to the person or persons in whose home the child has been living in a wholesome and stable

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[2] Byron B. states, "I affirmatively assert that every action the court has previously taken against my family unit operates outside the law and is undeniably unlawful and a product and a byproduct of prejudicial error and malfunction of the court."

[3] Byron B. also makes claims of impropriety in appointing O. P. a temporary guardian, but the trial court's issuance of temporary guardianship letters is not appealable. (Prob. Code, § 1301, subd. (a).)

[4] All further statutory references are to the Probate Code unless otherwise indicated.

environment"; and last, "[t]o any other person or persons deemed by the court to be suitable and able to provide adequate and proper care and guidance for the child."

Before making an order granting custody of a child to someone other than a parent, over the objection of a parent, "the court shall make a finding that granting custody to a parent would be detrimental to the child and that granting custody to the nonparent is required to serve the best interest of the child." (Fam. Code, § 3041, subd. (a).) Detriment to the child, for the purpose of this statute, is defined to include "the harm of removal from a stable placement of a child with a person who has assumed, on a day-to-day basis, the role of his or her parent, fulfilling both the child's physical needs and the child's psychological needs for care and affection, and who has assumed that role for a substantial period of time." (Fam. Code, § 3041, subd. (c).) A finding of detriment does not require any finding of parental unfitness. (*Ibid*.) The finding of detriment must be supported by clear and convincing evidence. (Fam. Code, § 3041, subd. (b).)[5]

It is the public policy of the State of California "to assure that the health, safety, and welfare of children shall be the court's primary concern in determining the best interest of children when making any orders regarding the physical or legal custody or visitation of children." (Fam. Code, § 3020, subd. (a).) It is also state policy that "the perpetration of child abuse or domestic violence in a household where a child resides is

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[5] Family Code section 3041, subdivision (d) provides that if the court finds by a preponderance of the evidence that the person to whom custody may be given is a person described by subdivision (c)—that is, that the person "has assumed, on a day-to-day basis, the role of his or her parent, fulfilling both the child's physical needs and the child's psychological needs for care and affection, and who has assumed that role for a substantial period of time"—then that finding "shall constitute a finding that the custody is in the best interest of the child and that parental custody would be detrimental to the child absent a showing by a preponderance of the evidence to the contrary." (Fam. Code, § 3041, subd. (d).) Price argues that she is such a person, and that the burden of proof therefore shifted to Bobbitt. Because the trial court did not make any ruling or finding that Price was a person described by Family Code section 3041, subdivision (c), the court performed the analysis set forth in Family Code section 3041, subdivisions (a) through (c), and substantial evidence supports the court's findings, we do not review the guardianship order under Family Code section 3041, subdivision (d).

detrimental to the child." (*Ibid*.) In making determinations of child custody, the trial court shall "consider and give due weight to the wishes of the child" if the child is "of sufficient age and capacity to reason so as to form an intelligent preference as to custody." (Fam. Code, § 3042, subd. (a).)

In ruling on the guardianship petition, the trial court made several pages of factual findings, all by clear and convincing evidence. The court found that it would be detrimental for Byron B. to have custody of the children. After examining "all the circumstances bearing upon the best interests of the minor children, their emotional well being and the need for community and stability in their relationship and care," the court also found that placement with O. P. was required to serve their best interest.

Byron B. argues that there was no substantial evidence of detriment. We conclude that there was substantial evidence to support the trial court's conclusion that it would be detrimental to the minors to be in Byron B.'s custody. There was evidence of domestic violence against Y. P. and the children: Y. P.'s best friend testified that Y. P. told of being hit by Byron B. on more than one occasion. During the divorce proceedings Byron B. had pushed Justus B., causing her to fall and be hurt, when she refused to tell the judge that she wanted to live with her father. Jeffrey J. reported that he remembered Byron B. hitting Y. P. once. Y. P. had also sought and obtained a restraining order against Byron B., reporting that in the past Byron B. had threatened her with a knife to her throat. At the hearing on the restraining order Byron B. orally requested that the order be mutual, and Y. P. did not oppose this request. Byron B. was arrested for felony assault on Y. P., although the matter was dismissed when she did not appear at trial. The Legislature has expressly stated that domestic violence is detrimental to children. (Fam. Code, § 3020, subd. (a).)

Further evidence of detriment is found in incidents during Byron B.'s visits with his children. Byron B. refused to return J. B. after a scheduled visit until the police intervened. While caring for Justus B., Byron B. assisted her in removing a cast for a broken bone without permission from the doctor; the cast had to be replaced. He violated

visitation orders by arranging unscheduled visits directly with the children, and he failed to appear for scheduled visits without any notice.

Psychological testing by the court-appointed evaluator, James Long, M.D., Ph.D., showed Byron B. to respond defensively and to try to present himself in a favorable manner that minimized his emotional problems. He demonstrated a tendency to externalize problems, seeing his problems as resulting from the actions of others. The evaluator raised some concerns about Byron B.'s anger and potential for temper outbursts, noting that his lack of self-control in legal proceedings "bespeaks some serious impulse control" deficiencies. The evaluator wrote, "He comes across as a very angry man with a distinct paranoid flavor to his thinking. He repeatedly says that he is being tricked." The pattern of Byron B.'s answers to standard testing questions was associated with diagnoses of schizophrenia and paranoia. The evaluator observed, "Antimanic and antipsychotic medication may be beneficial."

From his interviews, testing, document review, and observations, the evaluator identified several particular issues that caused him to conclude that Byron B.'s custody would be detrimental for the minors: Byron B.'s problems of angering easily and difficulty controlling his temper; evidence of his untruthfulness; evidence that he was somewhat paranoid; his lack of compliance; and his unreliability. The evaluator also opined that it would be detrimental to remove the children from O. P.'s care: "Because the stability, the consistency in terms of discipline, consistency of love and affection that is gentle and yet at the same time firm; strong emphasis on education, I think that that consistency will have a powerful impact on the children in terms of their development, educationally and personally and that—and less consistent environment [that Byron B. would offer] is going to have an impairing effect on them academically, socially, and emotionally." Byron B. attempts to minimize this evidence by characterizing it as "[t]he fact that one household might be a more enjoyable home than the other," but it is clear that the facts supporting a finding of detriment go far beyond a question of which home is more enjoyable.

When observed by the evaluator, J. B. appeared to be attached to and comfortable with Byron B., but Justus B. was "sullen and minimally interactive with her father." Justus B. said that she would seek O. P. if she was sad or scared, that her father got angry and yelled at her, and that although he has never hit her she is fearful that he might. Justus B. wanted to live with her grandmother and visit with her father. She sometimes did not want visits with Byron B.

In arguing that the evidence is insufficient to support the finding of detriment, Byron B. appears confused about the nature of the evidence that was required and the applicable legal standard. Byron B. seems to contend in some portions of his brief that the court cannot remove children from parental custody without a finding of parental unfitness and argues that "there was no finding of 'unfitness' in Dr. Long's report."[6] The law is now clear that "[a] finding of detriment does not require any finding of unfitness of the parents." (Fam. Code, § 3041, subd. (c); see also *Guardianship of Olivia J.* (2000) 84 Cal.App.4th 1146, 1153 [enactment of what is now Family Code section 3041 "changed the focus of a custody dispute between a nonparent and a parent, from the unfitness of the parent, to the detriment to the child"].) Byron B. also argues that because there was "zero showing of prior mistreatment of children there is no basis for the court's ruling finding detriment." The legal standard is not "prior mistreatment of children," but detriment if the child is in the parent's custody; contrary to Byron B.'s assertions, abuse or abandonment is not required. (Fam. Code, § 3041; *Guardianship of Olivia J.*, at pp. 1155-1157 [guardianship may be granted despite absence of allegations of serious abuse, neglect, or abandonment].) Byron B. also argues that for detriment to be found, there must be a "bizarre or extreme situation," "an extreme threat to the children from granting custody to the appellant," evidence that parental custody would cause

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[6] Byron B. further complains that the evaluator did not abide by the Family Code's parental preference and applied an unlawful standard for awarding custody, but the responsibility for determining and applying the appropriate legal standards rests with the trial court, not with the court-appointed evaluator.

"permanent psychological damages" or "profound emotional harm," and "evidence of great magnitude showing such an order [of guardianship with a nonparent] was necessary to avert harm to the children." Byron B. is misstating the legal standard for nonparent guardianships ordered over the objection of a parent, which is set out in Family Code section 3041, subdivision (a): whether (by clear and convincing evidence) parental custody will be detrimental to the children, and whether placement with a nonparent is required by the best interest of the children.

Factual distinctions between the present case and the facts of *Guardianship of Phillip B.* (1983) 139 Cal.App.3d 407, *Guardianship of Zachary H.* (1999) 73 Cal.App.4th 51, *Guardianship of Marino* (1973) 30 Cal.App.3d 952, *Guardianship of Pankey* (1974) 38 Cal.App.3d 919, and *Guardianship of Shannon* (1933) 218 Cal. 490 do not invalidate the court's finding of detriment. "The question whether parental custody is detrimental to the child is highly dependent upon facts unique to each child and parent. To attempt to define the circumstances that might qualify as an 'unusual and extreme [case]' (*In re B.G.* [(1974)] 11 Cal.3d 679, 698) warranting appointment of a nonparent as guardian, over the objections of a parent, would deprive the court of the flexibility essential to its equitable jurisdiction. As this court explained in *Guardianship of Phillip B.*, *supra*, 139 Cal.App.3d 407, 'the Legislature *purposefully refrained from prescribing specific criteria in determining whether parental custody would be "detrimental,"* reasoning that "[i]t is a nearly impossible task to devise detailed standards which will leave the courts sufficient flexibility to make the proper judgment in all cases." [Citation.]' (*Guardianship of Phillip B.* at p. 421; see also *Guardianship of Marino, supra,* 30 Cal.App.3d at p. 959, fn. 5 . . . ['"[w]hat is detrimental has not been set forth with particularity"'].) The preference for parental custody is adequately protected by requiring that the petitioner demonstrate by clear and convincing evidence that parental custody is detrimental to the child, without attempting to enumerate, by judicial gloss on the statutory language, what categories of factual circumstances may or may not be recognized as detrimental to the child." (*Guardianship of Olivia J.*, *supra*, 84 Cal.App.4th at p. 1157.)

Byron B. also contends that the trial court failed to consider particular evidence when making its finding of detriment. Specifically, Byron B. asserts that the trial court should have considered the existing custody order made during the divorce of Y. P. and Byron B.; that the children had lived with their mother and Byron B. for their entire lives; that they had never lived with O. P. before their mother died; and that there was no evidence "that the children were in any way mistreated during the many years that appellant had custody." The child custody order made in the course of the dissolution of the marriage of Byron B. and Y. P. was dissolved not by the guardianship but by Y. P.'s death. (*Guardianship of Donaldson* (1986) 178 Cal.App.3d 477, 485-486 [custody order made in dissolution terminates on parent's death]; Fam. Code, § 3010.) The custody order was not therefore relevant to the guardianship proceedings. It was established that the children had not lived with O. P. before the death of their mother, but that does not in any way undermine the court's conclusion that placement in their father's custody would be detrimental within the meaning of Family Code section 3041, subdivision (a). As discussed above, the alleged fact that there was no evidence that the children were mistreated while Byron B. had custody of them is not determinative in the analysis of detriment. (*Guardianship of Olivia J.*, *supra*, 84 Cal.App.4th at p. 1155.)

Byron B. next asserts that the court's finding that granting custody to O. P. was necessary to serve their best interests was not supported by evidence. We disagree. The evaluator observed that O. P. offered the children "stability, [] consistency in terms of discipline, consistency of love and affection that is gentle and yet at the same time firm; [and a] strong emphasis on education." He believed that O. P.'s "consistency will have a powerful impact on the children in terms of their development, educationally and personally." O. P. had a good relationship with the children: the evaluator found that she and J. B. appeared very comfortable together, and that she and Justus B. "appeared quite close," with no tension between them. O. P. demonstrated good judgment, did not drink alcohol and had never used drugs. Psychological testing and analysis found O. P. to be conscientious about her responsibilities, more open than the average child custody litigant, bonded with the children, and able to be counted on to protect the children's

interests. Jeffrey J.'s father, Jeffrey J., Sr., reported that O. P. offered the children "good discipline and structure."

Byron B. argues that the evidence in fact showed that the children had been in the joint custody of their parents until Y. P. died, that O. P. had only occasional contact with the children prior to their mother's death, that Byron B. initially allowed the children to stay with O. P. so that their schooling would not be disrupted, and that Byron B.'s attempts to block O. P.'s assumption of care of the children were stymied by the courts. These asserted facts do not alter our conclusion that the evidence supported the trial court's determination that custody with O. P. was required to serve the children's best interests and that the trial court did not abuse its discretion in placing the children with their grandmother.

Byron B. claims that the finding concerning the best interest of the children "is not a finding of potential harm to the children from granting custody to the appellant." The best interest inquiry is distinct from the question of detriment. Here, the trial court made both the required findings for awarding a guardianship to a nonparent over parental objection: that custody with Byron B. would be detrimental and that the children's best interest required that they remain with O. P. Byron B. also argues that the best interests of the children may be the applicable standard in a dissolution case but not in this case, which he characterizes as a "proposed modification of an existing custody order." Byron B. is incorrect on two counts. First, this was not a proceeding to modify a custody order, but a hearing on a petition for a nonparental relative guardianship. Second, the children's best interest is part of the legal standard for such a guardianship: the trial court is required to make not just a finding of detriment from being in parental custody, but also a finding "that granting custody to the nonparent is required to serve the best interest of the child." (Fam. Code, § 3041, subd. (a).)

Byron B. makes a number of other arguments concerning the guardianship proceedings, none of which has merit. First, he argues that the trial court erroneously placed the burden of proof upon him and treated the hearing on the permanent guardianship as a hearing on a motion to terminate the temporary guardianship. We

agree that in conjunction with Byron B.'s mid-hearing motion to dismiss the petition for guardianship, the trial court did make statements that suggested some confusion as to the procedural posture of the case and the relevant appropriate burden of proof. The extensive analysis reflected in the trial court's written decision on the guardianship petition, however, demonstrates that notwithstanding any initial confusion, the trial court rendered its ultimate decision in full comportment with the statutes governing guardianships and applying the proper standard of proof.

Second, Byron B. devotes pages of briefing to the termination of parental rights and other irrelevant legal proceedings. This was not a petition to have the children declared free from the custody and control of their parents under Probate Code section 1516.5, so Byron B.'s discussion of that statute is not relevant. Byron B.'s parental rights were not terminated by the trial court, although he is under the mistaken impression that they were. A guardianship is not a termination of parental rights.

As Byron B. has not established any error by the trial court in granting the petition for guardianship, we affirm the judgment of the trial court.

DISPOSITION

The judgment is affirmed. Respondent shall recover her costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

ZELON, J.

We concur:

PERLUSS, P. J.

WOODS, J.